Federal Screw Works *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–31379

April 19, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 14, 1992, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief in response to the exceptions. The Respondent then filed replies to the other parties' briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The Respondent excepts to the judge's findings that it unlawfully issued ''poor'' evaluations to 13 employees and then discharged or caused their employment to terminate. We adopt his findings, which are fully supported by the credited evidence, but only with respect to the seven employees actually named in the complaint: Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp. We agree with the Respondent's exception regarding the other six employees. The record shows that the charge allegations regarding these six were dismissed on February 26, 1991, and thereafter the General Counsel never sought to amend the outstanding complaint to include these six allegations and never attempted to revive or litigate them at the hearing. In fact, in his brief to the judge, the General Counsel consistently referred to the seven employees named in the complaint as the discriminatees at issue and never indicated that he sought to include any additional discriminatees. Contrary to the judge's erroneous finding, the record clearly shows that the General Counsel's motion to conform the pleadings to the evidence specifically addressed unrelated matters. Cf. *Sonicraft, Inc*., 295 NLRB 766 (1989), enfd. 905 F.2d 146 (7th Cir. 1990) (no denial of due process where the General Counsel moved to amend the complaint to include allegations closely related to the outstanding timely filed charge). In these circumstances, we find that the 8(a)(3) allegations involving Linda (Lucht) Bromlee, John Lange, Tim Mills, Jack Pfaff, David Schied, and Don Sims are barred by Section 10(b) of the Act and are not properly before the Board for determination on the merits. Accordingly, we shall modify the Order to delete any reference to employees Bromlee, Lange, Mills, Pfaff, Schied, and Sims.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Federal Screw Works, Big Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

''(a) Offer Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

''(b) Make Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision; provided that such amounts shall be offset by the amounts of the severance payments that these individual employees received, to the extent that such backpay amounts exceed the severance payments; provided further that those employees not entitled to backpay shall retain the severance payments they received.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we perceive no evidence the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

[2] In adopting the judge's conclusion that the Respondent violated the Act regarding the seven named discriminatees, we find it unnecessary to pass on his discussion concerning whether the Respondent may have violated any other Federal law or statute.

[3] The judge stated that the discriminatees, who were unlawfully evaluated, should be awarded $2000 which represents the lower bonus payment. We decline to pass on the specific dollar amount, but leave this issue to compliance. We conclude that the correct remedy is to order the Respondent to make the discriminatees whole by paying them what they would have been paid without the discrimination against them. We amend the remedy section of the judge's decision accordingly.

The Respondent excepts to the judge's refusal to classify as interim earnings the severance pay given to the terminated employees. We find merit to the Respondent's exception and shall modify the recommended Order accordingly. See *Sheller-Globe Corp*., 296 NLRB 116 (1989).

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue ''poor'' evaluations and discharge or otherwise cause the termination of any employees because of activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp whole for any loss of earnings and other benefits resulting from their terminations, less net interim earnings, plus interest. Such amounts shall be offset by the amounts of the severance payments that these individual employees received, to the extent that such backpay amounts exceed the severance payments; provided further that those employees not entitled to backpay shall retain the severance payments they received.

WE WILL expunge from our files any reference to their unlawful terminations and their underlying evaluations and notify them in writing that this has been done and that evidence of the unlawful discharge and evaluation will not be used as a basis for future personnel actions against them.

FEDERAL SCREW WORKS

Joseph P. Canfield, Esq. and *Sherrie E. Voyles, Esq.*, for the General Counsel.

Frank S. Galgan, Esq., of Troy, Michigan, for the Respondent.

Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Big Rapids, Michigan, on June 17–21 and September 16–19, 1991. Subsequent to several extensions of the filing date, briefs were filed by all parties. The proceeding is based on the charge filed January 9, 1991,[1] by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. The Regional Director's complaint dated February 28, 1991, alleges that Respondent, Federal Screw Works, of Big Rapids, Michigan, violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing written evaluation ratings of ''poor'' to seven named employees and then discharging them or causing their termination because of their union or other protected concerted activities.

On a review of the entire record[2] in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture, distribution, and sale of fasteners for the automotive industry. It annually ships goods valued in excess of $50,000 from its Big Rapids location to points outside Michigan and it admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent has operated a manufacturing facility in Big Rapids since about 1976, and currently employees approximately 100 production employees. It has other, older facilities at Chelsea and Romulus, Michigan, that have been represented by the Union for decades and it has a 4-year-old Brighton, Michigan facility where the employees are unrepresented. The employees at the involved Big Rapids facility voted to be represented by the Union in December 1987. The Union, through its International Representative Dennis Vanderlind, requested bargaining on January 4, 1988, but received no immediate response from the Company.

In January 1988, after the Union had won the election, Tom ZurSchmiede became general manager of the Big Rapids facility. ZurSchmiede is a vice president and a member of its board of directors and of the principal owner's family. Prior to his move to Big Rapids, he was in charge of Respondent's Chelsea and Brighton divisions, supervising their general managers, and he had rarely visited Big Rapids.

[1] All following dates are in 1990, unless otherwise indicated.

[2] The Charging Party's motion to correct the record dated January 24, 1992, is granted and received into evidence as C.P. Exh. 2.

At the time of the election, the Big Rapids facility was supervised by General Manager Jack Marsh. Respondent agrees that Marsh, who was hired to reverse the financial losses being experienced in Big Rapids, was an arbitrary and abusive manager and it attributes his management style to being the cause of employee dissatisfaction.

In 1987, ZurSchmiede was involved in contract negotiations at Romulus and he assumed the role of principal and only company negotiatior when negotiations began with the Union at Big Rapids after he became general manager. In addition to problems with apparent employee discontent, the Big Rapids facility was not profitable and ZurSchmiede established a goal for himself to turn things around in 6 months.

ZurSchmiede gave a speech to the employees, announced that he had terminated Marsh, and spoke about a program of cooperative management. Among other things, he also announced that all reprimands (other than safety violations and insubordination) were being removed from the employees' files. This amnesty announcement was subsequently repeated.

In response to ZurSchmiede's request, the Union supported increased productivity on a new project for Honda. Union Representative Vanderlind also spoke at the same meeting and urged the employees to be cooperative with management. Thereafter, by letter of March 28, 1988, the Union gave Respondent a ''no strike'' commitment to assist the Company in assuring its business relations with Ford Motor Company.

During the first 9 months of 1988, the parties engaged in approximately 15 bargaining sessions. In addition to Vanderlind, the Union's bargaining committee was composed of Chairperson Jack Fike and committee members Ron Sharp, William Jones, and Leon Saladin (who resigned during the latter part of negotiations and was replaced by Bruce Kennedy, who announced his resignation just prior to the decertification vote, during a general employee meeting).

The seeming progress of negotiations began to stall in mid- to late-1988, and Vanderlind advised ZurSchmiede in an away-from-the-table discussion that if he had to, he would strike to reach an agreement. ZurSchmiede replied that his response would be to sign a contract, then close the plant and move to Indiana.

On October 13, 1988, the Employer presented a final offer entitled ''Big Rapids Division Labor Proposal.'' This was described by ZurSchmiede as a ''tentative agreement.'' However, Vanderlind considered it to be merely a draft of the Company's final offer. Although it did contain provisions which the parties had previously agreed on, it also contained work rules and a disciplinary scheme and also included wage reductions and a bonus system that was never negotiated with the Union.

The proposal also contained 17 work rules and a disciplinary program never negotiated. It describes certain offenses that would result in immediate discharge; however, a progressive disciplinary scheme is established for ''loafing''; ''production of a major amount of scrap material or material requiring rework or repair''; and ''horseplay'' as it relates to wasting time. For these offenses, the proposal envisions first a written warning, then a 3-day disciplinary layoff, then a 5-day suspension, and for the fourth offense, discharge. These rules are similar to those in the Company's 1985 handbook. No rules prohibit such things as profanity, inappropriate social conduct, an uncooperative attitude, or lack of commitment.

At the time this final offer was presented to the Union, a decertification movement had begun at the plant and Vanderlind declined to submit the offer to the employees for a ratification vote because it contained proposed wage reduction from the preunion rate. Thereafter, between two and four additional bargaining meetings were held with no movement in the wage proposal.

The decertification petition was filed on December 20, 1988, and dismissed on January 3, 1989, as untimely. A second petition was filed on January 9, 1989. It was delayed by pending unfair labor practice charges until November 8, 1989, when an NLRB election was conducted. The election resulted in 81 votes against the Union and only 13 votes in favor of representation. A Certification of Results followed.

Prior to the decertification election, ZurSchmiede conducted several management meetings in which supervisors were ''straw polled'' about which of their employees supported the Union. James Jones, who was maintenance supervisor between 1988 and 1990, testified that he attended approximately six management meetings in advance of the decertification election where specific employees' union sympathies were discussed. These meetings were attended by Supervisors Dennis Love, production control; Carmen Bean, area manager; Dale Weeks, manufacturing manager; Donna Panetta (French), human resources manager; Dave Ayriss, plant manager; Linda Cruz, personnel supervisor; Jeffrey Blackmer, quality manager; and ZurSchmiede.

ZurSchmiede, Ayriss, and Bean lead the meetings. Among employees identified as prounion for the decertification vote were Dan Durst, Dan Golgolowoski, Jack Fike, Joe Hamilton, Debra Becker, Bill Jones, Butch Schoen, John Lange, David Schied, Larry Hinsley, and Ron Sharp. Some others were singled out as antiunion including Bud Spaugh, Todd Peck, Doug Sarns, Rick Lloyd, Stan Bushre, and Dave Yost. ZurSchmiede indicated that the Company wanted a union defeat in the decertification election and Jones testified that either ZurSchmiede or Aryiss stated that union supporters would be ''dealt with when the time come [sic].''

Curt Smith, a supervisor of secondary operations between early 1986 and February 1989, confirmed that straw polls at management meetings were conducted and that Zurschmiede brought up the issue of employees' union sympathies by asking supervisors to get a feel for employees' intentions about the decertification vote. He recalled that specific prounion employees identified were Dave Smitterberg, Sharp, Durst, Schoen, Fike, and Jones.

Warren Hunter was engineering and quality manager from July 1988, until he left on March 9, 1990. He corroborated the fact that, at management meetings in advance of the decertification election, ZurSchmiede questioned supervisors about which employees were prounion and antiunion, and he recalled that those identified at the meetings as prounion were Fike, Durst, Hamilton, Hinsley, Schoen, Becker, Dan Sims, Linda Luchts, Sharp, and Jones. Strongly antiunion employees were Todd Peck, Randy Spedoske, Dan Hover, Rick Lloyd, Doug Sarns, Bud Spaugh, Joe Steinberg, Shortsle, and Glazier. Based on these meetings, Hunter predicted to the other supervisors that only 13 employees would vote for the Union. Subsequently, in March or April 1990, employee Tim Mills observed a list of 13 names on

ZurSchmiede's desk which included Hamilton, Pfaff, Fike, Durst, Sharp, Sims, Hinsley, Jones, Luchts, and Schoen.

Bean and ZurSchmiede each testified that management's new cooperative policy worked successfully but engendered some employee complaints about persons who were not doing their fair share. ZurSchmiede also testified that he had daily meetings with managers and on a number of occasions they informally discussed the need to do employee evaluations. ''Sometime'' in 1990, ZurSchmiede instructed Donna Panetta, human resources manager, to form an evaluation work group. Her selection of five employees, Linda Cruz, Joe Steinberg, Cathy, Witzke, Bud Spaugh, and Rich Lloyd, was submitted to and approved by Ayriss and ZurSchmiede. Of these, Steinberg, Spaugh, and Lloyd had been identified in management meetings, which Panetta attended, as strongly antiunion; Cruz is the Employer's personnel supervisor.

The establishment of the evaluation criteria is presented by the Respondent as an accomplishment of the initial work group; however, ZurSchmiede testified that ''We had talked about these things over and over and over and none of these ideas was in any way new. Their accomplishment, I think, was in putting it into an understandable sort of code or criteria.''

Panetta, who has completed a year toward an MBA and has several years' experience with state, Federal, and private labor and employment organizations, testified that she was hired to establish and implement employee involvement programs within the concept of a workplace, sense of community, and family working together where ''if one thing was good for one person, it was always good for all employees.'' She was present at all meetings of the group and said her role was that of a ''facilitator'' who tried to keep the group ''on track.'' As an example of how Panetta ''facilitated'' the functions of another work group, employee Debbie Becker testified that Panetta would give them examples to work with and sometimes would tell them that what they were coming up with was not what ZurSchmiede had in mind. Shortly before evaluations began, the original employee work group was then expanded to include Tony Ottobre, Phil Shortsle, Doug Sarns, Todd Peck, Dave Yost, and Stan Bushre. They reviewed the evaluation form presented by the initial group and came up with some ''minor revisions.'' None of the members of this group were union supporters during the decertification petition but, in fact, were named in the management meeting preceding the decertification vote as being against the Union.

Members of management were also formed into a ''staff group'' consisting of Panetta, Carmen Bean, Jeff Blackmer, and Dale Weeks. This group, followed by Ayriss and ZurSchmiede, reviewed and approved the final evaluation form. The management staff group then performed the initial evaluations of the employees. The employee's immediate supervisor was not consulted regarding the evaluation and an employee would not necessarily be rated by his supervisor even if the supervisor was on the management staff committee.

The evaluation was divided into six subsections specifically entitled: ''commitment, cooperation, mutal respect and trust, willingness to improve as part of a group, sense of urgency, and specific job capability improvement.'' The results for each subsection were determined by the answers to the majority of questions within that subsection. The subsection on ''commitment'' was considered the ''most important.'' A space for rating of ''outstanding,'' ''good,'' or ''poor'' was provided in response to each question, as well as several lines for comments; however, these lines were often not filled in.

This initial evaluation was then given to the employee work group for review. Panetta acted as facilitator or leader at these meetings and described the process as employees reaching a ''consensus'' on each evaluation.

Employee Douglas Sarns testified that the role of the employee committee in the evaluation process was to review the already completed evaluations and voice agreement or disagreement as they were passed around the group by Panetta. If the employee and management disagreed, the evaluation was completed anew by the management committee, then resubmitted to the employee group.

Originally, the management staff group rated 13 people as ''poor,'' including Jack Fike, Dan Durst, Vaughn Schoen, Ron Lange, Roy Yarbrough, Gordy Ellis, and Al Scott. The employee group upgraded Scott and Ellis, but concurred that the other 11 employees should receive ''poor'' evaluations. The employee group then added Sharlene Boerma, Dick Glazier, Linda Bromlee (Lucht), David Schied, Tim Mills, George Traver, Dale Mitchell, Lou Dillinger, Dan Clarry, Dave Sandlin, and Ben Chupp as employees who should be rated ''poor.''

The two groups then met to reconcile their lists and decided on the final listings based on a consensus, in which everyone indicated agreement. The joint review resulted in 16 employees being rated ''poor.'' This includes those added by the employee group excluding Traver, Mitchell, Dellinger, Clary, Sandlin, and Chupp who stayed ''Good,'' as initially rated by the mangement group.

The management group met individually with each ''poor'' employee on August 21 (August 22 for Schied), and then on two subsequent occasions. Bean testified ''not a lot of detail'' was given to employees about the content of their evaluation at the initial confrontation. After their initial meeting with the management group, each employee was escorted to a meeting with Plant Manager Dave Ayriss.

Some employees testified that ZurSchmiede had mentioned an evaluation system at an employee meeting but could not recall when that occurred. Most employees learned of the evaluation process via rumors just prior to the announcement of the evaluation results in August 1990, and then at a general meeting on August 22.

ZurSchmiede called a general employee meeting on August 22, and explained the evaluation process, and described a 30-day correctional period. He said he was ''dead serious'' about the possibility of discharge for the poorly rated employees. ZurSchmiede told employees that those who had not yet received their evaluation forms had been ranked ''good'' or ''outstanding'' and would receive bonuses of $2000 and $3000 respectively. ''Poors'' would receive nothing because they had refused to enter into the family or to cooperate with their coworkers. Zurschmiede then said he was offering those who had recieved poor evaluations 3 months' severance and it was his advice to them that they take it, because they would not make it back at the end of the 30-day grace period. He said that at the end of 30 days, the offer would be retracted. ZurSchmiede added that if the employees had not been able to turn themselves around in 2 years, they would

never be able to do it in the 30 days and they might as well take the money and go. ZurSchmiede said it was ''their own damn fault'' and then said that some might ask why he was giving these people severance money, but that was because even bad people had good families.

Plant Manager Ayriss, who had authority to negotiate separation terms, met with every ''poor'' rated employee to reinforce the severity of the process and present their options. Three ''poor'' employees, Lucht (Brownlee), Pfaff, and Lange, promptly opted for termination with a separation agreement.

The seven ''poor'' employees discussed below initially attempted to dispute their evaluations and then attempted to improve during the grace period. Hamilton, Hinsley, Jones, Schoen, and Sharp thereafter relented after becoming discouraged in their efforts and they each entered into a separation agreement. Both Fike and Durst held out for 30 days and were terminated, but the Respondent then encouraged them to enter into a separation agreement and the termination papers were torn up.

After the evaluations were publicized, employee Debra Becker requested a meeting with Ayriss and complained that the evaluation process was unfair. Ayriss became angry and started shouting. When Becker suggested the severance offer be made to the whole shop, Ayriss asked her if she would take it, and then asked how many employees would leave and who were they. She estimated 10 to 12, but refused to identify particular employees. Later, Aryiss offered Becker a severance package, which she accepted.

No attempt was made to show that these separations were for economic reasons and, otherwise, it appears that at this time the plant was operating shorthanded and some employees were working overtime.

The seven employees who are the primary subject of this proceeding are shown on the record to have been ordinary employees in most respects but with stronger than average work skills, colored by some idiosyncrasy or distinctive personality characteristic. The other common thread is their strong personal integrity and their connection to the Union.

Jack Fike was a machine repairman from 1976 until 1990. He received compliments for his work from Price, Weeks, and ZurSchmiede. He received only one writeup, 12 years ago. Fike was one of the primary union activists in the plant both duing the original organizing campaign and after the Union was certified, when he was elected to and served on the bargaining committee. He also served as the Union's observer at the decertification election. Prior to that vote, Fike was asked by Weeks and ZurSchmiede whether he believed that a union was still needed and earlier, during negotiations, ZurSchmiede once told Fike that part of the reason the Company moved away from Detroit was because of the Union and that he would move the plant again.

Fike's ''poor'' evaluation accused him of being ''obstruct'' [sic] and ''uncooperative,'' ''wasting time,'' ''trying to undermine the operation of the plant by verbally knocking down policies,'' ''constant verbal downgrading of plant functions,'' ''destructive of the community,'' and working to ''undermine the foundation of the plant community.'' No specific examples were offered to illustrate these comments. After Fike read it, he asked the management group for specific examples of things he had done to deserve the poor rating. He was told they could not provide specifics but added that he could quit and receive a severance or try to correct the problems within 30 days. Fike said he would would like to attempt change and was sent to see Ayriss. Fike asked Ayriss for specific examples and explanations for his ''poors.'' Ayriss responded that if Fike could not see what he was doing wrong he should take the severance because the offer would not be there in 30 days.

Fike then talked to Bushre and Peck, both of whom were on the employee evaluation committee. Bushre said the evaluations were made up by ZurSchmiede and Ayriss to come out a certain way and the committee could not change them. Peck suggested that Fike apologize to ZurSchmiede for his union activity. Both said Fike was a good worker as did other committee members Yost and Spaugh. Letavich, a supervisor, told Fike he was the best machine repairman the Company ever had.

On August 28, Fike visited Bean at his home and said he wanted to change. Bean told Fike to be more serious at work and that he thought Fike could turn it around. Fike met with Weeks on August 29 to ask him what he could do to correct the problems. Weeks said they would talk about it in 2 weeks. At that time Fike was given additional guidelines that were critical of his ''cooperation.'' Fike told Weeks the guidelines were not helpful. Weeks replied that he did not think Fike could correct his problems, and should see Ayriss about a severance agreement.

Fike met with ZurSchmiede on September 10 and told him he was sorry for anything he said to the evaluation committee. ZurSchmiede said he should apologize to the committee himself. On September 11, Fike met with Weeks, French, and Blackmer and gave them a corrective action evaluation letter apologizing for anything that was said or done to the evaluation committee. At this time Fike was given a written evaluation which stated that he was ''still trying to find fault with the evaluation process. You don't accept the constructive criticism that was offered in the evaluation and therefore are not working hard to correct the problems.''

He also was criticized for voluntarily working overtime to finish a repair after his supervisor had told him he wouldn't get paid for it, because it showed noncommitment to the plant community (apparently by seeking overtime work). After this meeting, Fike met with Ayriss and expressed his confusion over the 2-week evaluation saying he had not been told what he was doing wrong, but had only received further criticisms. Ayriss answered that if he couldn't admit he had a problem, then he really had a problem and again urged him to think about the severance offer.

Fike's wife, Darlene, then met with Ayriss to ask how Fike could retain his job. Ayriss reiterated that Fike had to exhibit commitment, cooperation, and respect and not play pranks on employees.

On September 25, Fike's birthday, he was called into Ayriss' office informed that things did not look good, and asked if he wanted to talk about a severance. Fike said he wanted to see what the committee had to say.

When Fike met with the committee, Weeks told him that his 30 days were up and that it was their opinion that he had made no effort to improve or show any improvement at all. Weeks, specifically stated that Fike was seen working on two different occasions past his scheduled shift, which supported the conclusion that he was a poor employee. At the hearing Fike explained that on both of these occasions he had noti-

fied his supervisor that he needed to stay over to finish a job. When told by his supervisor, Darrel Price, that the Company could not pay overtime, Fike said it was okay and worked over anyway. When Fike asked them for examples of what he didn't do that he should have. No one answered him. Weeks then told Fike he was being released.

Fike again met with Dave Ayriss and signed a termination agreement. After signing this document, Ayriss told Fike he could resign instead of being fired and get a separation agreement. Fike asked Ayriss if he could take the written settlement agreement to a lawyer but Ayriss declined and went on to say that if Fike didn't take the settlement he would have a hard time getting a job in Big Rapids as it was a small town and that he had a nice wife and family and he should think about them.

Fike agreed to terms, signed the settlement agreement, and left the plant. Later, when Fike returned with Dan Durst, to retrieve their tools, Bernie Letavich stated he didn't understand why the Company was firing the two best repairmen they had.

At the hearing Respondent's witnesses gave additional, specific reasons for Fike's ''poor'' evaluation. According to Bean, Fike was guilty of too many practical jokes and was the sole nonparticipant at department meetings. Employee Douglas Sarns accused Fike of putting his (Fike's) name on Sarn's tools, interfering with another employee's lunch, and encouraging employee Tim Mills to make sexually offensive remarks to the women who worked in the office.

Other allegedly objectionable practical jokes were attributed to Fike including hiding employees' toolboxes and sliding his own toolbox in front of employee Anthony Ottobre's forklift truck about 20 to 30 times, including 4 days before Fike lost his job. Ottobre also claimed Fike ''or maybe Glazier'' put water on his forklift as a joke. Fike denied any pranks involving his toolbox, explaning that his tools are worth approximately $2000 and his toolbox weighs 900 pounds and is difficult to maneuver.

At the hearing, Fike produced tools with his name permanently engraved in them and Sarns' initials hastily scratched on them and stated that this type of ''exchange'' of tools was not uncommon in the plant. Fike explained that he had been the brunt of one missing lunch joke, and numerous witnesses testified to a variety of practical jokes engaged in by employees. Charles Everloch, former plant facility engineer and shipping and receiving supervisor in 1988–1989, testified that Fike always did a good job and would never jeopardize equipment. Everloch rated Fike as a ''real good'' repairman, ''very knowledgeable.'' Warren Hunter, former engineering manager, corroborated that Fike was a good employee.

Fike's supervisor, Darrell Price, testified that Fike continually attempted to record his actual working hours instead of just 8 hours each day. No overtime pay was allowed then, according to Price, who claimed Fike was not really working overtime because employees were expected to work 32 hours per week and to get paid for 40 hours regardless of whether they worked 32 or 40 hours. Fike however, testified that he volunteered and worked in excess of 40 hours (not 32) without overtime pay, for a total of 30-1/2 unrecorded hours in excess of 40 hours in various weeks. Otherwise, Fike had a perfect attendance and tardiness record.

Larry Hinsley started with the Company in 1977 as a janitor, moved to utility, then to quarter packer, and for the last 8 years was quarter packer leader. He was hired under a vocational rehabilitation program whereby the State paid one-half of his wages for 6 months. He had been considered to be retarded until he was 18 and it was discovered that he suffered from hearing and speech defects as well as a nervous condition. He reads at a 6th to 7th grade level and has been sick on occasion but otherwise has not been absent. He has never received any writeups from his direct supervisor and on occasion has received compliments about his work. Hinsley was a vocal supporter of the Union and wore a UAW T-shirt and hat. My evaluation of Hinsley's appearance and demeanor reflect a somewhat ''eccentric'' personality colored by his hearing and speech problems and mannerisms that appear to reflect his attempts to mask these problems.

Hinsley was given a ''poor'' evaluation on August 21. Dale Weeks handed Hinsley a letter and said the letter would explain how the evaluation was done. Hinsley read the letter and said he did not understand what it meant. He then read the evaluation. Many of the comments on Hinsley's evaluation repeat the same criticism that he paces himself to do ''minimal'' work. He also was criticized for ''trying to tear down the plant community, not respecting fellow employees and lacking committment.'' No specific conduct is cited. While reading the evaluation, Hinsley became increasingly upset and said he did not understand parts of the evaluation, and why he received so many ''poors.''

Weeks told Hinsley that he didn't think that he would make it and Hinsley asked the committee why his foreman, Denny Love, had not evaluated him, as he was the most familiar with his work. They answered that Love wouldn't have given him a fair evaluation but the committee would. Hinsley said that he wanted a chance to try and turn his performance around. Weeks said that he was so poor that it was unlikely, then told him to see Ayriss.

Hinsley was upset and emotional but told Ayriss he would do his best to improve and asked for guidance on how to do that. Ayriss said he did not know what Hinsley should do and that he would be better off taking the severance. Ayriss said Hinsley should think about the offer overnight. The next day Hinsley told Ayriss he thought the evaluation was unfair, however, Ayriss replied that he did not care about what Hinsley thought and told him to talk to Weeks.

Hinsley received a followup letter, that gave him no guidance on how or what to improve, however, Panetta told Hinsley he had to become committed to the plant community and to stop using his handicap as an excuse for not participating in group meetings.

After receiving his evaluation, Hinsley started attending nonmandatory meetings, he asked to join a new work group (but was told it was full even though it had been announced only the previous day), he came in early to set things up so his group was more efficient, and he worked unpaid overtime. Hinsley then went back to Ayriss to see if he would be allowed to stay. After after Ayriss said he didn't think so, they began to negotiate a severance agreement. Ayriss agreed that Hinsley was emotional and was convinced he would be terminated but said a severance of 3 months' pay wasn't enough for his car payment and asked for a year. After some give and take Ayriss agreed to give Hinsley 9 months' severance pay, 4 weeks' vacation pay, and 6 months' insurance.

Carmen Bean testified that he concurred with others who rated Hinsley as ''poor'' because Hinsley refused to do things a packer leadman should do and because he caused friction with his counterpart on the other shift. Bean said he discussed the problem with Hinsley without success, however, no discussions were recorded in Hinsley's personnel file and no other action was taken. Employee Bushre claimed Hinsley worked slowly and took the easy jobs. Hinsley, however, never was disciplined or removed from his leader position as a result of these alleged deficiencies. In fact, in 1989, he was sent to take a processing control course and received a certificate of completion (but testified that he had copied a lot of answers on the test). Bean also criticized Hinsley for preparing shipping labels ahead of time. Hinsley does not dispute this, but testified that he was working according to his supervisor's instructions. He also testified that his shift regularly exceeded their packaging goal of 800 boxes a day.

Hinsley also described how he was made the butt of jokes by both other employees and supervisors. For example, Supervisor Love put a lit cigarette in Hinsley pocket (which resulted in a burn blister), and laughed when Hinsley slapped at it and thought it was a bee sting. Tony Ottobre (an evaluation committee member), was identified as a habitual joker who would do such things as unpluging Hinsley's machine when it was running labels. Ottobre, as well as Rick Lloyd (also an evaluation committee member), Dick Glazier, and others also mocked Hinsley's speech mannerisms and his hearing, repeatedly telling him to ''get the rag out'' of his ear.

Ottobre, Glazier, Lloyd, and Bean, among others, also habitually teased employee Tim Mills about his speech impediment and lack of sexual experience in specific terms, often linking the two by statement such as ''if you get some [sex] your speech will be better.'' Mills denied that Fike ever suggested that he go to the office girls with a sexual remark but testified that he had done so at the urging of employees Bud Spaugh and Tom Marek. Mills added that, although Fike also talked to him about sex and stuff, it was in a serious way because he did not know a lot and he asked Fike questions because Fike was someone who wouldn't laugh at him.

Mills is younger than most of the other employees and he had a severe speech impediment. His testimony and demeanor demonstrate that he is functional but also moderately retarded and naive. He was a janitor at the Company between 1986 and 1990 and an excellent worker, but was described by one company witness as having the mentality of a 10 year old.

As the result of the suggestions by Spaugh and Marek, Mills did make suggestive remarks to the office girls who then complained to Manager Panetta who subsequently told Mills at his evaluation meeting about his obnoxious speech to women. Mills was not one of the original ''poor'' evaluees but his name was added by the employee group. Mills resigned after being given this evaluation and his separation was not alleged as a violation of the Act in these specific proceedings. Respondent otherwise was aware of Mills' handicaps when he was hired. Employee Sarns, a plant electrician and former janitor (who was called as Respondent's witness), described Mills as ''very honest'' and said the shop was never as clean since he has left as what it was when he was there. Sarns testified that Mills did excellent work, but indiscriminately took everybody's advice when it came to how to act.

Mills testified that ''everybody'' made sexually suggestive remarks to him. When he was asked on cross-examination by Respondent's counsel ''when'' employees said these things to him, he answered:

> A. Everyday on the hour, every hour, every minute, every second I walked in. I got sworn at, cussed at, thrown shit on me.
>
> Q. When did it start?
>
> A. When I went out, you know—they got to know me more and it began more and more.

Mills was not called by the General Counsel in the presentation of his direct case, although counsel had knowledge of the information that Mills then gave when called as a rebuttal witness. Accordingly, when Respondent objected to Mills testifying about an observation he made when he was cleaning in ZurSchmiede's office, I sustained the objection. The General Counsel made an offer of proof (in question and answer form), in which Mills testified that in April or March 1990, he had seen a list of 13 names on ZurSchmiede's desk. He remembered most of the names without assistance and otherwise confirmed that all 13 names listed were those who thereafter got poor evaluations. When asked by Respondent's Counsel if he was sure it was in April. Mills responded he was sure because it was window washing time and April or March was when he washed windows.

Under all these circumstances, I find that Mills' testimony is highly honest and credible and helpful to the record. It appears that the General Counsel was reluctant to initially use Mills' testimony because of his perceived disabilities, however, I find that they do not detract from the credibility or reliability of his testimony and I therefore reverse my ruling sustaining of Respondent's objection and I accept the testimony disclosed in the offer of proof as credible evidence.

Employees Durst, Hamilton, Jones, Schoen, and Sharp were all skilled, long-term employees (Hamilton started in 1976 and all the others have been with the Respondent since at least 1979). Durst was a skilled journeyman repairman who participated in a work group in which he raised the issue with Panetta concerning the possibility that they were infringing on a subject of bargaining (this position subsequently was recognized as correct). He also made attempts to record his actual hours worked (when he was working unpaid, volunteered overtime), that were disallowed. Hamilton was successively a floor inspector, final inspector, and chief inspector and received only one work-related writeup, 10 years ago. When Hamilton became active in early union organizational activities he was instructed to stay in his work area. Thereafter, ZurSchmiede spoke specifically to him prior to the decertification vote and suggested to him that the Union was unnecessary.

Jones started as a floor inspector and was made a final inspector. He had no record of discipline and he was recognized for having 10 years of perfect attendance. He also was on the bargaining committee and wore a union shirt at work prior to the decertification vote. Schoen was a boltmaker who was complimented for his work by three different supervisors and told that he produced more bolts than anyone. He wore union parafanalia and was questioned by Bean about

his union support and the identity of other supporters. Sharp was a setup operator who became a boltmaker, and once was complimented by Weeks as the best ''outfitter'' the Company had. He also received a bonus and gift for 5 years of perfect attendance. He was on the bargaining committee until the decertification of the Union.

Each of these employees was rated ''poor'' and experienced the same general series of events regarding notification, attempts to learn specifics regarding the evaluations, and discouragement related to his chance for improvement, as described by Fike and Hinsley, and each was induced to sign a separation agreement (Durst, like Fike was terminated after 30 days but then given another opportunity to negotiate a severance agreement).

At the hearing Sharp was criticized by Respondent witnesses for his bad temper. Sharp admitted having this problem but testified he had successfully curbed his actions prior to the evaluation, after this same subject was discussed with ZurSchmiede in connection with consideration for a possible promotion. Other employees, including both Ottobre and Peck (each rated ''good''), had recognized temper problems, as did A. Glazier (rated ''good''), who once physically attacked another employee. Sharp accepted the severance offer after he asked Ayriss what would happen if he subsequently had a lapse in control of his temper and Ayriss curtly answered: ''no more screw ups.''

In May or June 1990, ZurSchmiede called Schoen into his office and asked him to donate overtime. Schoen said he would only work overtime if he was paid for it. I credit Schoen's testimony that contrary to most all of the other boltmakers, Schoen, Richard Jones, and Bowman had discussed and agreed among themselves that they would not work for free, but Jones and Bowman reneged after ZurSchmiede called them into his office.[3]

ZurSchmiede, while looking directly at Schoen, announced at an employee meeting that only one employee had refused to donate free time. At ZurSchmiede's direction, Schoen was transferred to several unskilled jobs before being returned to boltmaking. Ayriss agreed Schoen was a talented boltmaker but Weeks said he had a quality problem. Bill Jones (an inspector), said it was no worse than others and Respondent offered no documentation. Much of the time Schoen was assigned to the oldest, least efficient machine yet he was told he was doing a good job and received no job performance complaints. His evaluation ''comments'' recognized him as one of the most experienced, knowledgeable operators but repetitively criticized his quality, speed, and tidiness.

Jones' evaluation acknowledged that he acomplished his work but, with no examples given, said he failed to participate in meetings or make improvements. Ayriss told him a ''total turnaround'' was needed and that it wasn't about hard work but about ''commitment, cooperation, and respect.''

Hamilton's evaluation had comments on work ethic, lack of commitment, slow response to unexpected problems, failure to present ''solutions,'' casual approach, and isolation. It does not state that he ever threatened employees, refused to perform his work, refused to train employees, or reacted argumentatively about his work assignments, all reasons that were latter advanced at the hearing to describe his performance. Bean otherwise testified that Hamilton was the most experienced and knowledgeable inspector in the plant. Hamilton's followup letter criticized him as uncooperative and lazy. Ayriss told him he was ''unquestionably a good employee,'' but ''not a team player.'' Hamilton's supervisor, Blackmer, told him that he felt Hamilton would be fired and that it would jeopardize his own job to try to help him.

Durst's evaluation criticized his commitment, work ethic, lack of trust of coworkers, remoteness, and poor work habits, each without specific examples. Durst told the management group that he thought it was a joke but he attempted to improve. Durst's followup letter said Durst was putting on a show (of good work), which would not last.

On September 17, Weeks saw Durst talking in the heat treat office (about a furnace problem that Durst had been called to diagnose and fix). Weeks did not overhear what they were discussing and he did not overhear what they were talking about but Durst later was told he would be fired because he had been seen talking and drinking coffee.

Durst was said to do good work and former plant facility engineer Charles Everloch, testified that Durst was a ''very fine maintenance employee.'' Durst also testified that he had stayed over and worked weekends when equipment was down, often without compensation. He admitted that he often drank coffee in the plant but after receiving his evaluation, worked through lunches and breaks.

III. DISCUSSION

The primary event behind this proceeding was the sudden termination of 13 employees who were rated ''poor'' in a newly implemented evaluation program. This occurred shortly after decertification of the Union following a year of fruitless negotiations between the Company and the Union and a union loss in the decertification election by a vote of 81 to 13. The record otherwise shows that the 13 terminated employees, who all were induced to sign separation agreements, were all identified to management as persons with past and continued union sympathies.

A. *The Separation Agreements and Constructive Discharge*

The Respondent contends that each employee seperated signed a valid ''separation Agreement'' following their respective receipt of ''poor'' evaluation and therefore left ''voluntarily.''

Among other terms, each separation agreement also provides as follows:

> 4. As a material inducement to the Company to enter this agreement, Employee hereby irrevocably and unconditionally releases and discharges the Company and its shareholders, directors, officers, agents, and employees from any and all claims or causes of action of any nature, whether known or unknown (including but not limited to claims arising under any law relating to discrimination or the right of the Company to terminate its employees) which Employee now has or may hereafter acquire.
>
> 5. Employee represents that he has not filed any lawsuit, complaint or charge against the Company or any

[3] Bowman and Jones denied any agreement but after Bowman testified at the hearing, Schoen commented to him: ''How soon we forget''; to which Bowman responded: ''You do what you gotta do to keep your job.'' This conversation was corroborated by Becky Durst.

> person released hereunder with any governmental agency or court relating to Employee's employment by the Company or the termination of such employment and Employee agrees not to do so in the future (provided, of course, that Employee may enforce the Company's obligations under paragraphs 2 and 3 hereof). Should Employee breach the obligations of this paragraph, Employee agrees to pay all costs and expenses, including actual attorney's fees, incurred in defense of such lawsuit, complaint or charge.

The ''charge'' in this proceeding was not brought by any individual employee but by the Union. The ''Complaint'' of course was issued by the Regional Director and I find that the terms of the agreement noted above are not a bar to the actions of the Union and the Regional Director in seeking the enforcement of rights arising under Section 7 of the Act. See Section 10(a), which provides:

> The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

The ''separation agreements'' involved were not made with any consideration of specific employee rights under the Act nor were they ''settlement'' agreements to resolve a dispute regarding possible unfair labor practices. Moreover, the facts show that they were individually and collectively imposed upon the employees by coercion and duress. Under these circumstances, such private agreements are not binding on the Board, compare *Independent Stave Co.*, 287 NLRB 740 (1987), and they do not effectuate the purposes and policies of the Act when they otherwise are shown to be the product of a constructive termination. A payment of severance pay cannot be considered to be a substanial remedy in circumstance involving illegal termination where the normal remedy includes reinstatement and backpay. And, as noted by the Charging Party, a separation agreement does not remedy the rights of the employees who are entitled to a workplace free of the coercive impact that is implicit in the atmosphere surrounding a mass termination of prounion employees.

Contrary to the contention of the Respondent, I find that the record clearly shows that the Company imposed burdens upon the employees that were intended to and did cause them to ''resign'' and accept the company enticement of a settlement agreement. Moreover, as discussed below, these burdens and conditions were imposed for discriminatory reasons. Accordingly, the General Counsel convincingly has shown the elements necessary to prove constructive discharge. Specifically, I find that the employee resignations were not freely entered into. The employees were told that if they did not sign the release they would be terminated at the end of 30 days. When some of them made an effort to ''improve,'' the Company created an atmosphere of conditions in which the affected employees were not given anything more than nonspecific, broad generalities of what their alleged deficiencies were and they were aggressively told that it was, in effect, futile to try to improve their ''poor'' rating within the 30-day deadline. This atmosphere was exacerbated by ZurSchmiede's speech in which he predicted that they wouldn't make it through the ''grace'' period and threatened that the severance payment offer would be retracted in 30 days. Durst and Fike proved the futility of trying when they, in fact, were terminated at the end of 30 days. As discussed above, these employees were constantly reminded by members of management, including ZurSchmiede, that they would never be able to turn their ''poor'' conduct around and that they would eventually be fired anyway. It also was made clear to the employees by the management staff committee that whatever they did, including working overtime and through their breaks and lunches, was not enough.

These are conditions that adequately show a burden (upon continued employment), so difficult and unpleasant as to render any ''resignation'' invalid. This is especially true in view of the credible testimony of several of these employees who described how they were ''hustled'' into signing the agreement without any real opportunity to review it or to have their own legal counsel review it. Despite the fact that Durst and Fike were terminated, the Respondent then ''negotiated'' with them the next day, resended its actions, and ''allowed'' them to resign with a separation agreement in a patent attempt to discourage them (through the paragraphs set forth above which purport to release the Company and prohibit further claims by the employee), from pursuing any further actions regarding their terminations. This conduct by the Respondent is essentially in the nature of a bribe (involving several months pay beyond the 3 months' payment initially offered), and is inconsistent with a belief or the actuality that it had legitimately terminated them the previous day.

Under these circumstances, it is concluded that all the employees evaluated as ''poor'' and induced to agree to these separation agreements did not resign voluntarily but were subjected to constructive termination.

B. *Employer Motivation*

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate them. Here, the record shows that Respondent's management was well aware of union activity at the plant dating back to selection of the Union in December 1987, followed by a year of fruitless contract negotiation. After the Union won the election, however, the Respondent made some contemporaneous improvements in overall working conditions and this was followed by decertification of the Union with the approval of all but 13 employees who still remained sympathetic to the Union.

Several former supervisors who participated in management meetings (and who left Respondent's employment under nonprejudicial circumstances), credibly testified and confirmed that at the time immediately preceding the decertification vote, management discussed and reached informed conclusions on the number and identity of those employees who continued to support the Union. Little more than half a year after the decertification, most of these same individuals were evaluated as ''poor'' employees and told they would be terminated, after a brief, 30-day grace period. They also were discouraged from attempting to remain and encour-

aged to accept a monetary separation package. As shown in the discussion below, the employees' evaluation as ''poor'' workers was not based upon a valid objective review of their qualifications and performance. Moreover, they were terminated without any asserted economic justification at a time when Respondent required overtime and there was no shortage of work. They also were terminated after Respondent principal operating official, Vice President ZurSchmiede, had expressed antiunion remarks, and had given a speech connecting those rated as ''poor'' as employees who refused to embrace the corporate ''family,'' employees who should accept a severance agreement because they would not make it through a 30-day grace period.

These employees were terminated after they were identified as prounion in straw polls that were conducted in management meetings (as credibly testified to by former supervisors who were in attendance), and after top official ZurSchmiede or Ayriss had said union supporters would be dealt with ''when the time comes.'' Although not relied upon, except as cooberative evidence, I also find that janitor Mills credibly testified that he saw a list of names on Zurschmiede's desk in March or April 1990, which was consistent with those names subsequently evaluated as ''poor,'' and names which were the same as those identified in management meetings as those who still favored the Union.

As discussed below, the record also shows that the evaluation process utilized by the Respondent was biased and predisposed to identify those who failed to embrace a cooperative, nonunion workplace, as ''poor'' employees.

These factors established antiunion animus on the part of the Respondent. Moreover, recognition of the timing of the evaluations and terminations only a few, ''discrete'' months after the decertification vote, the bonus rewards to nonunion employees, and the hasty and pretextual 30-day correctional grace period, all combine to warrant a conclusion that the General Counsel has established a strong prima facie showing that union activity was a motivating factor in the Respondent's decision to terminate this group of employees. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. In light of the General Counsel's strong prima facie showing, the Respondent's burden here is substantial, see *Vemco, Inc.*, 304 NLRB 911 (1991). Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent contends that only three of the seven employees named in the complaint (Fike, Jones, and Sharp) were on the bargaining committee and were known to ZurSchmiede as active union supporters and it argues that the remaining four were so ''virtually inactive'' that there is a de minimis basis for interference of animus against them.

Contrary to Respondent's assertations, the record shows at least nominal union activity as well as management identification of them as employees specifically named and included in its ''straw poll'' to identify remaining union sympathizers. In any event, in circumstances involving a mass or group termination, there is no need that each individual be identified specifically as a known union activist for the General Counsel to substantiate his already strong showing that Respondent's overall action was discriminatorily motivated and that this discrimination affected everyone in the group, see the Board's discussion in the *Vemco* case, supra.

Otherwise, Respondent's defense centers on a reliance on its evaluation of each alleged discriminatee as a ''poor'' employee as a valid basis for termination.

C. *Respondent's Employee Evaluation Format and Process*

In part, the Respondent's reliance on the affected employee's ''poor'' evaluations begs the question as to why a ''poor'' evaluation required termination. Initially, it is noted that the evaluations were a new, ''one time'' occurance and when done they initially were not placed in the employees' normal personal file. Although some of Respondent's witnesses gave ''after-the-fact,'' anecdotal criticisms of most of the ''poor'' employees, there was no objective, justifiable claim that any one of them was seriously deficient in the quality or quantity of their work.

Fike was said to be a ''real good repair man'' who always did a good job. The others were skilled long-term employees without attendance or other disciplinary problems. Hamilton, for example, had progressed from floor inspector to final inspector, to chief inspector, and he was recognized as the most experienced and knowledgeable inspector in the plant. If in fact he had a deficiency in ''responding to unexpected problems,'' it is not explained why he was not merely demoted form his chief inspector job, instead of termination, the most severe corrective action possible.

Hinsley, for example, despite his handicaps, including his speech and hearing impediments, was promoted to quarter packer leader where his performance was acceptable and even complimented. If in fact his job performance required corrective action, it is not explained why he was not returned to being a packer rather than being terminated completely.

Even Mills, who was one of the 13 evaluated ''poor,'' was described as an excellent janitor who kept the plant cleaner than it has been since he left, yet he was summarily induced to sign a separation agreement. Respondent made no attempt to recognize that his evaluation criticisms did not reflect upon his work performance and his ''poor'' ratings were attributable to his handicap or to workplace harassment inflicted upon him by other employees because of his vulnerability.

In each of these examples, as well as with the other ''poor'' employees, the Respondent made no effort to relate the ''poor'' evaluations to improved work performance (such as aggressiveness training or counseling for Hamilton or Sharp for their respective ''isolation'' or ''bad temper''). Although the described purpose of the employee evaluations were presented in terms of providing a vehicle for the identification of problems and improvement in performance, the Respondent made no correlation between this purported goal and the individual evaluations and it provided neither a clear identification of asserted problems nor a reasonable or adequate timeframe in which an asserted but deficient employee could attempt to improve. As noted above, these employees were actively discouraged, rather than assisted, in meeting any improvement or correctional goals. This approach by the

Respondent, as well as the lack of any economic justification for any reductions in force, and its insistance on termination rather than some lesser form of disciplinary or corrective action, clearly supports an inference that Respondent's utilization of the ''poor'' evaluations was a pretextual devise to rationalize the termination of prounion employees.

This conclusion is reinforced by a review of the actual evaluation format and process and recognition that the evaluation format had a discriminatory predisposition to repetitively classify employees with prounion sympathies as uncooperative, nonfamily oriented, and therefore ''poor.''

Here, the Respondent attempts to mask what is shown to be an underlying unfair labor practice with a divergence into discussions about cooperative management theories and their asserted relation to the employee evaluations. Contrary to the Respondent's implications, this case, and any finding herein against the Company, is not a ruling at odds with cooperative management and therefore anticompetitive in its conclusions and results. What is demonstrated here is the misuse, or the potential for such misuse, when the concept of cooperative management is endorsed and applied in such an extreme way that it became a vehicle for restricting the basic Section 7 rights of its employees.

Here, it also appears that management's emphasis on cooperation from its employees, also has contributed to the covering up of probable violations of the Fair Labor Standards Act as well as the Civil Rights Act of 1964.

Here, the Respondent attempts to hide its involvement in the establishment of its evaluation criteria by claiming that the product was the sole process of an employee work group. This assertation is not consistent with the record. Specifically, as noted above, Human Resources Manager Panetta ''facilitated'' the functions of the group with examples and might comment that some things suggested by the group were not what ZurSchmiede had in mind. ZurSchmiede himself stated that the group's ideas were not new but were ideas (about cooperation, a workplace community, and family), that were talked about over and over and merely codified into a set of criteria. Moreover, the makeup of the group, selected by Panetta, included no recognized prounion employees, and, in fact, three of the original five previously were identified in a management meeting (in Panetta's presence) as strongly antiunion and one worked directly for Panetta in personal matters.

The evaluation criteria consisted of 25 questions divided into the six areas prefaced with the following ''principles'':

> Our objective as a group, or plant community, is to protect the family of every employee. However, not only must the group be committed to the individual's well being, the individual must also be committed to the group's well being.
>
> We believe that the characteristics which best allow us as a group to protect our families are, in their order of importance, the following:
>
> *Commitment* to the welfare of the group
>
> *Cooperation* as the primary expression of commitment
>
> *Mutual respect and trust* as the primary basis of cooperation
>
> *Willingness to improve* as part of a *group*
>
> *Sense of urgency* to accomplish tasks, overcome obstacles, and develop new talents both in a group and as an individual
>
> *Specific job capability improvement* in support of the group

There were nine questions in the ''commitment'' category, four under ''cooperation'' and three each in the remaining catagories.

The first question asked is:

> 1. Is the employee committed to the well being of the plant community?[4]

These are only three alternative ways to answer the question: poor, good, or outstanding. Three lines are provided for comments and while some of the entries for those who received overall ''poor'' evaluations have some written comment, many ''poors'' were made without explanation. By way of comparison Dave Yost (who was named to the expanded work group) was rated ''outstanding'' in most all questions without a single written amplification.

The Respondent presented testimony from a professor, knowledgeable in the area of work behavior and performance and the cooperative workplace, who testified that the evaluation form and process by which it was implemented was valid. Although the court accepted the professor's qualification as an expert witness, the Board holds its own expertise in matters such as this and is not bound to accept the expert witness' testimony as controlling. Here, the record otherwise demonstrates overriding evidence that conflicts with Respondent's expert's evaluation, and I find that the overall record refutes the expert's opinion regarding the revelant validity of the evaluations.

First, although the witness indicated a familiarity with performance evaluations within the automotive industry at Ford Motor Company, his experience was with white collar employees rather than production workers. He also did not answer directly the court's questions regarding the validity of evaluations on the similiar concepts of commitment to the community and mutual respect and trust, when such an evaluation is made just after there has been a divisive vote between two groups in the workplace. He also admitted that the evaluation process could be manipulated to shape the results. He also stated that the purpose of employee evaluations is to produce improvement in employee performance and that when a rating system is tilted in one direction by having two positive ratings (good and outstanding) and one negative (poor), the idea usually is to encourage improvement.

---

[4] Other questions, which tend to follow the same theme, include:

5. Is the employee willing to to do task which may not be his duty but which help the community, without being asked?

10. Is the employee cooperative?

11. Does the employee help others cooperatively?

15. Does the employee's behavior demonstrate that he understands the importance of mutual respect and trust to the plant community's well being and survival?

17. Does the employee show a willingness to improve as part of a group?

18. Does the employee work toward achieving a consensus when working in a group?

19. Does the employee utilize the knowledge of others to improve as part of a group?

Here, however, I find the process was not to encourage improvement but to identify on a pass (good or outstanding)—fail (poor) scale those who were not ''committed to the group welfare,'' a phrase that appears to be an euphemism for nonunion. As noted above, ''poor'' rated employees were discouraged from trying to improve and were offered incentives to leave. Those who were naive enough to try to meet the brief, 30-day improvement deadline were given no encouragement and they were directly terminated at the end of 30 days (but then given a separation payment in exchange for an agreement purporting to relinquish their possible legal remedies).

The evaluation itself, both in its statement of principles and most important criteria, is set forth with a vocabulary of terms that are not ideologically nutural. In short, the evaluation is set in terms that are biased and predisposed to identify any employees that remain prounion after the decertification vote as necessarily being anticooperation, anticommunity, and antigroup or family.

Ironically, if the same evaluation would have been made 15 months earlier, ''poor'' employees such as Fike, Jones, and Sharp, who were all on the union negotiating committee working with the support of and on behalf of the majority of employees (at a time when the Union had cooperatively given management a no-strike agreement to ensure continued business with Ford Motor Company and had publically urged employee cooperation with management), would have had to be rated as ''outstanding'' on these same criteria.

When Fike's job as a repairman led him to attempt to finish repairing a machine for the next day or shift and to list his actual hours worked, he could have been praised as having a sense of urgency and being committed to the overall plant but he was criticized for these actions because he was ''not committed to the plant community.''

Suddenly, however, the prounion employees were part of a small minority and therefore could not be viewed as cooperative or family oriented because they had not totally embraced Respondent's applied philosophy of mandatory consensus and commitment to the groups' well being. The evaluation criteria, although seemingly redundant in several respects, was suggested, reviewed by, and approved by management and, at this time it was applied (shortly after the decertification election), it was especially and inherently biased and predisposed to identify prounion employees as uncooperative, nonfamily oriented and therefore ''poor'' employees. Respondent's use of only three ratings, one negative and two positive, also ensured that those evaluated as being ''family'' outsiders would be vulnerable to disciplinary action and no alternative ratings were possible (the least biased evaluations commonly have four, five, or more criteria and include a choice of negatives, such as unsatisfactory or needs improvement, or neutral, such as fair or satisfactory, criteria).

Within these criteria, as in ''Newspeak,'' in Orwell's *1984* (Harcourt, Brace, 1949), the expression of individual, nonmajority or unorthodox action or opinion is not tolerated and therefore the individual must be rated poor if he has engaged in ''heresies'' that question or oppose management's ''big Family'' (''Big Brother''), type pronouncements. Here, the members of the evaluation groups have played the part of Orwell's ''Thought Police'' and have confirmed the identity of those employees whose characteristics and past behavior indicate, through the vocabulary and euphemisms of the criteria, that they might commit some action against the interest of management as embodied in the corporate family concept. After identification, the response, as in Orwell's novel, supra, is a purge.

This purging of employees is not shown to have been required by any legitimate business reason. To the contrary, the record otherwise indicates that it was illegally motivated and resulted in the communication of a clear message to other employees that no lingering involvement with unionism, independent thoughts, or concerted activity, would be tolerated by the Company. Here, the Respondent's use of an employee participation committee or work group as a device to seemingly lay the groundwork for identification of the allegedly ''poor'' employees, clearly was not proper for the reasons discussed above. It did not legitimize Respondent's own actions in influencing and manipulating the constructive termination of almost all of those employees so identified, and I find that it demonstrates the overall pretextual nature of Respondent's defense.

Also, it is noted that criticisms directed at several ''poor'' employees are directed at behavior (such as temper, horseplay, and production quality), that was tolerated in employees who were nonunion. Also, Glazier (added to the ''poor'' group by the employee committee) was strongly antiunion and was quickly ''rehabilitated'' to a ''good'' classification. The record clearly shows disparate treatment that emphasizes the pretextual nature of Respondent's defense. This is especially true since the reasons for the evaluations most often reflect occurrences that took place in the past and do not reflect ZurSchmiede's promise of ''amnesty'' and that employees would be considered to have ''clean slates'' as of the time he took over management of the plant. Its actions in terminating employees for a ''poor'' evaluation also is inconsistent with its work rules and its purported system of progressive discipline.

Lastly, it also is noted that one aspect of the criticism of several employees was that they were uncooperative or uncommitted because of their attempts to record the actual number of hours they worked, specifically hours in excess of 40 hours a week, and their refusal or reluctance to work unrecorded, unpaid so-called voluntary overtime. The employees resistance to Respondent's actions in this regard were protected concerted activities and Respondent's actions in not recording, not paying, and soliciting ''voluntary'' overtime appear to be illegal and a violation of the Fair Labor Standards Act. The fact that the former unit employees were paid on a weekly, not hourly, basis after the Union's decertification does not exclude them from the provisions of the FLSA and, under that Act, hours worked in a week in excess of 40 hours must be recorded and paid for at an overtime rate. Moreover, an employee *cannot* voluntarily waive the provisions of the statute.

It also is noted that title VII of the Civil Rights Act of 1964 prevents job discrimination against handicapped persons. Here, the evaluations for employees Hinsley and Mills appear to fault them for matters associated with their recognized handicap status and these asserted faults are not claimed or shown to be valid evaluations or predictors of job performance. Hinsley (with speech and hearing impediments which affected his active participation in group meetings) was actually criticized by Manager Panetta for using his handicap as an excuse.

These latter two examples further show the illegitimacy of Respondent's evaluation process and the pretextual nature of its alleged justification for its actions. Under all these circumstances, I find that the Respondent would not have evaluated this group of employees as poor or have so hastily terminated the employees in the group were it not for the union activities at Respondent's plant. I find that Respondent was motivated by a desire to purge any remaining union presence left after the decertification election and that the terminations were a pretextual exercise of its economic and manipulative power over its employees designed to influence and interfere with the exercise of employee rights under Section 7 of the Act. The record shows that the mass termination initiated by Respondent on August 21, 1990, was for illegal and discriminatory reasons and I conclude that the General Counsel has met his overall burden and has shown that Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

Finally, Respondent's violation of the Act shown above is shown to have been directed not only at the seven individuals named in the complaint but at the entire class or group of employees that were evaluated as ''poor'' and constructively terminated on or shortly after August 21, 1990, as a result of those evaluations. The other persons in the group were terminated based on the same underlying violation of the Act involving those named in the complaint and the circumstances were fully litigated within the framework of the existing complaint. Therefore, in accordance with the General Counsel's motion to confirm the pleadings to the evidence and on the court's own motion, the complaint will be amended to include within the provisions of the remedy herein all persons in the class affected by Respondent's mass termination initiated on August 21, 1990. Accordingly, I further conclude that the Respondent's collective discharge of all of these employees is shown to have been in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing ''poor'' evaluations and by discharging or otherwise causing the termination of employees Vaughn Schoen (August 21), Ron Sharp (September 5), Joe Hamilton (September 7), Bill Jones (September 7), Larry Hinsley (September 10), Dan Durst (September 25), and Jack Fike (September 25), respectively, as well as Jack Pfaff, John Lange, Don Sims, Linda Bromlee (Lucht), David Schied, and Tim Mills, on or after August 21, 1990, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended the Respondent be ordered to reinstate each of the discriminatees to their former job or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1989),[5] and that Respondent expunge from its files any reference to the termination, and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Because each discriminatee was illegally rated less than ''good,'' they were discriminatorily denied a $2000 bonus payment given to other employees, accordingly Repsondent shall be required to make the discriminatees whole in this respect, plus interest.

In making whole the employees for lost earnings and benefits, a question can arise as to whether the amounts of money paid by Respondent for each ''separation agreement'' should be treated as interim earnings. ''Settlement'' agreements involving disputed employee claims againt a company have been said to be interim earnings because they otherwise would result in a ''windfall to'' the employees and a ''penalty against'' the employer. *J.R.R. Realty Co.*, 273 NLRB 1523 (1985). In the instant case, however, there was no dispute in existence to be settled between the Company and either the individual employees or the Union when the Respondent committed its illegal action of evaluating them as ''poor'' and thereafter causing their termination by coercing them into acceptance of a separation agreement. Respondent's payments were not settlements that were clearly and nonequivocally directed at rights arising under Section 7 of the Act and enforceable by the Board. Instead, they were in the nature of ''bribes'' designed to obtain an unlawful objective and they were a decisive element in inducing the unlawful separations. To disregard such a payment as interim earnings under these circumstances would not constitute the addition of a punitive measure against the Respondent but would merely leave Respondent in the position it has placed itself in through its unlawful acts. It otherwise places the burden on the wrongdoer and prevents it from gaining some benefit from its wrongful act. Accordingly, any such payments made as an element of its wrongful acts should not be classifiable as interim earnings.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

---

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

Continued

ORDER

The Respondent, Federal Screw Works, Big Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing ''poor'' evaluations and discharging or otherwise causing the termination of any employees because of activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dan Durst, Jack Fike, Joe Hamilton, Larry Hinsley, Bill Jones, Vaughn Schoen, and Ron Sharp as well as Jack Pfaff, John Lange, Dan Sims, Linda Bromlee (Lucht), David Schied, and Tim Mills immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of the decision.

(b) Expunge from its files any reference to these terminations and their underlying evaluations and notify them in writing that this has been done and that evidence of the unlawful terminations and evaluations will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, mke available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Big Rapids, Michigan facility and mail to each person named in paragraph 2(a) above copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director of Region 7, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''